LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
NOV 12 1957
JOHN T. FEY, Clerk

# Supreme Court of the United States

OCTOBER TERM, 1957

---

No. 608

---

J. A. ROPER AND FRANCES G. ROPER, PETITIONERS,

*versus*

SOUTH CAROLINA TAX COMMISSION AND OTIS W. LIVINGSTON, CHAIRMAN, JAMES W. CRAIN, JAMES H. SULLIVAN, JAMES A. CALHOUN, JR., AND FRANCIS M. PINCKNEY, CONSTITUTING THE MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION, RESPONDENTS

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

---

J. D. TODD, JR.
Greenville, South Carolina

JULIEN D. WYATT
Pickens, South Carolina
Attorneys for Petitioners.

## INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Constitutional and Statutory Provisions Involved | 3 |
| Statement of Case | 4 |
| Reasons for Granting the Writ | 6 |
| Appendix | 9 |

## CITATIONS


| | PAGE |
|---|---|
| Eisner v. Macomber, 262 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570 | 6 |
| Equitable Trust Co. vs. Prentice, 250 N. Y. 1, 164 N. E. 723, 63 A. L. R. 263 | 6 |
| Helvering v. Griffiths, 318 U. S. 371, 63 S. Ct. 636, 87 L. Ed. 843 | 6 |
| Strassburger v. Commissioners of Internal Revenue, 318 U. S. 604, 63 S. Ct. 791, 87 L. Ed. 1029 | 6 |
| Towne v. Eisner, 245 U. S. 418, 38 S. Ct. 158, 62 L. Ed. 372 | 6 |


## OTHER REFERENCES


| | |
|---|---|
| 14th Amendment, U. S. Constitution | 3 |
| U. S. C. A., Title 26, Section 22-A | 3 |
| Title 65, Section 251, Code of Laws of S. C., 1952 | 3 |

# Supreme Court of the United States

OCTOBER TERM, 1957

---

No.....

---

J. A. ROPER AND FRANCES G. ROPER, PETITIONERS,

*versus*

SOUTH CAROLINA TAX COMMISSION AND OTIS W. LIVINGSTON, CHAIRMAN, JAMES W. CRAIN, JAMES H. SULLIVAN, JAMES A. CALHOUN, JR., AND FRANCIS M. PINCKNEY, CONSTITUTING THE MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION, RESPONDENTS.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

---

The petitioners pray that a Writ of Certiorari issue to review the decision and judgment of the Supreme Court of South Carolina entered in this case on the 30th day of July, 1957.

## OPINIONS BELOW

The opinion of the Supreme Court of South Carolina (app. 18-30) is reported at 99 S. E. 2d 377. The Order of the Court of Common Pleas for Pickens County, South Carolina (app. 11-18) is not reported.

## JURISDICTION

The judgment of the Supreme Court of South Carolina was entered July 30, 1957. Petition for rehearing was denied August 20, 1957. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A. 1256.

## QUESTIONS PRESENTED

Does the action of the South Carolina Tax Commission and the decision of the Supreme Court of South Carolina in accord therewith holding a stock dividend to be income when in reality such is not income and has been declared by this Court not to be income, deprive petitioners of due process of law and the equal protection of the law in violation of Amendment XIV. of the Constitution of the United States?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV.:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 65-251 of the Code of Laws for South Carolina for 1952:

"The words 'gross income' mean the income of a taxpayer derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property, and also from interest, rent, dividends, securities or the transaction of any business carried on for gain or profit and income derived from any source whatsoever. The amount of all such items shall be included in the gross income of the income year in which received by the taxpayer unless, under the methods of accounting permitted under this chapter, any such amounts are to be properly accounted for as of a different period."

Section 22-A, U. S. C. A., Title 26:

"General definition. 'Gross income' includes gains, profits, and income derived from salaries, wages or compensation for personal service (including personal service as an officer or employee of a State, or any polit-

ical subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly. In the case of judges of courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income."

## STATEMENT OF CASE

In 1954 the South Carolina Tax Commission asserted a deficiency income tax assessment against petitioners, J. A. Roper and Frances G. Roper, in connection with their 1951 South Carolina income tax return, the Tax Commission contending that the receipt of a preferred stock dividend in Roper Motor Company was income under the South Carolina Income Tax Statute and subject to income tax. Petitioners paid said assessment under protest and commenced an action to recover the amount so paid, namely Seven Thousand and Six Dollars ($7,006.00) and interest from May 15, 1954, the date of payment. The South Carolina Tax Commission demurred to the Complaint seeking such recovery, the Demurrer was sustained by Judge Steve C. Griffith, Presiding Judge of the Court of Common Pleas, Pickens County, South Carolina, and petitioners appealed to the Supreme Court of South Carolina. The Supreme

Court of South Carolina affirmed Judge Griffith holding that a stock dividend was income and subject to income tax under the South Carolina Statute. Petition for rehearing was filed which was refused on August 20, 1957.

Petitioners raised in their Complaint the question that for the South Carolina Tax Commission to declare as income that which in reality was not income was unconstitutional and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States. This question was ignored by the Circuit Judge. The same question was raised by petitioners in their exceptions to the Supreme Court of South Carolina and again the question was ignored by that Court in its decision. Petitioners again raised the question in petition for rehearing and the Order refusing the petition for rehearing does not indicate whether or not the South Carolina Supreme Court considered the matter at that time.

Roper Motor Company is a South Carolina corporation all the capital stock of which is owned by petitioner, J. A. Roper. In the fall of 1951 the charter of the Roper Motor Company was amended to provide for the issuance of twelve hundred forty (1,240) shares of preferred stock as a stock dividend, all of which was issued to petitioner, J. A. Roper. At the same time an entry was made on the books of the corporation transferring One Hundred Twenty-four Thousand ($124,000.00) Dollars from the surplus account of the corporation to the capital stock preferred account thereof. Before and after the issuance of the preferred stock to the plaintiff, J. A. Roper, his ownership in the assets of the corporation was identical and his proportionate interest in the corporation was the same.

That portion of the South Carolina Income Tax Statute defining gross income is to all practical purposes, so far as the questions presented in this case are concerned, identical with the provisions of the Federal Income Tax Statute and

was adopted by the South Carolina Legislature from the then existing Federal Statute.

## REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of South Carolina is not in accord with applicable decisions of this Court and on the contrary is in direct conflict with the decisions of this Court where identical questions of fact and law are raised. This Court has repeatedly held that a stock dividend which does not change the proportionate interest of the stockholder in the corporation is not income to the recipient of the dividend.

*Towne v. Eisner,* 245 U. S. 418, 38 S. Ct. 158, 62 L. Ed. 372;

*Eisner v. Macomber,* 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A.L.R. 1570;

*Helvering v. Griffiths,* 318 U. S. 371, 63 S. Ct. 636, 87 L. Ed. 843;

*Strassburger v. Commissioner of Internal Revenue,* 318 U.S. 604, 63 S. Ct. 791, 87 L. Ed. 1029.

Where a state attempts to declare and tax as income that which is not income, such action is unconstitutional and in violation of the Fourteenth Amendment.

*Equitable Trust Co. vs. Prentice,* 250 N. Y. 1, 164 N. E. 723, 63 A.L.R. 263.

In the *Prentice* case, Chief Justice Cardoza, later an Associate Justice of this Court, said:

> "In the view of the Supreme Court, it is so essentially capital that a statute taxing it as income must be disregarded as unconstitutional."

The South Carolina Tax Commission, by declaring as income that which is not income, is in effect denying Petitioners the equal protection of the law and depriving them of their property without due process of law. This raises

a substantial federal question. This Court has not heretofore determined or decided whether or not such state action constitutes a violation of the Federal Constitution. However, this Court has decided, under the Federal Income Tax Statute, as pointed out above, that a stock dividend where the proportionate interest in the corporation was not changed is not income to the recipient, but instead is capital. The Federal Statute defining gross income is, to all practical purposes, identical with the South Carolina Statute.

Where, as here, the State of South Carolina through the administrative action of its Tax Commission attempts to tax capital as if it were income, and without any factual or statutory basis for declaring it income, then the party taxed is deprived of his property without due process of law.

Where, as here, capital, in the form of stock dividends, is sought to be taxed as income, but other capital is not so taxed, the stockholder so taxed is denied the equal protection of the law guaranteed him by Amendment XIV.

Petitioners have consistently presented these questions to the Courts of South Carolina since the inception of this litigation. Their contentions have been ignored. Surely, petitioners are at least entitled to a judicial determination of their contentions.

Unless certiorari is granted by this Court, Petitioners will have had no Court pass upon their oft asserted contention that the taxation of stock dividends as income is contrary to the Federal Constitution.

It is respectfully submitted, for the reasons above stated, that certiorari should be granted.

Respectfully submitted,

J. D. TODD, JR.,
JULIEN D. WYATT,
Attorneys for Petitioners.

## INDEX TO APPENDIX


| | PAGE |
|---|---|
| Order of Court of Common Pleas for Pickens County | 11 |
| Opinion of the Supreme Court of South Carolina | 18 |
| Petition for Re-hearing | 31 |
| Certificate from Counsel | 33 |
| Order Denying Petition for Re-hearing | 34 |
| Certificate of Clerk | 34 |

## ORDER OF COURT OF COMMON PLEAS FOR PICKENS COUNTY

The plaintiffs, husband and wife, who had filed a State joint income tax return for 1951, brought this action against the South Carolina Tax Commission to recover an additional income tax assessed against them for that year in the amount of $7,006.00. The defendants demurred to the complaint, which was heard on November 22, 1954, and the matter was taken under advisement. Subsequently, the attorneys have filed comprehensive and able briefs, which have been very helpful. They agree in one respect, that one question is raised: "Is the dividend of preferred stock by a corporation, whose outstanding stock was common stock all owned by one individual, taxable as income to the owner of the common stock?"

The plaintiff J. A. Roper in 1951 owned all of the capital stock, consisting entirely of common stock, of Roper Motor Company of Easley, South Carolina. During that year he obtained an amendment to the charter of the corporation to authorize the issuance of preferred stock of the par value of $124,000.00. Thereafter, all of this preferred stock was issued to J. A. Roper as a stock dividend and appropriate entries were made upon the books of the corporation, resulting in the surplus account of the corporation being decreased by $124,000.00 and the capital stock account increased by the same amount. The plaintiffs did not report this stock as dividend in their income tax return for that year, and upon an examination of the return by the defendants the additional assessment was made, resulting in the payment thereof under protest and this suit to recover it.

The theory upon which the plaintiffs base their claim is that the State income tax act was modeled on the Federal Act and the United States Supreme Court had construed the Federal Act to mean generally that a stock divident is not "income"; and inasmuch as these interpretive decisions had been made and were generally known prior

to our State's adoption of the Federal Act, it must be presumed that the General Assembly of this State intended to adopt the Federal Court's definition of "income", relying upon *Fulghum vs. Bleakley*, 177 S. C. 286.

A study of the history of the income tax acts of the Federal Government and of this State will show that the present State income tax Act, Section 65-201, et seq., Code of 1952, is not a copy of the Federal statutes; and, likewise, a study of the cases on this question of the United States Supreme Court and of our State Supreme Court is convincing that we have not adopted the Federal definition of "income". In fact, as will be seen, no State has adopted the Federal rule.

In 1918 in *Towne vs. Eisner*, 245 U. S. 418, 62 L. Ed. 372, the United States Supreme Court held that a stock dividend was not income within the meaning of the Federal Income Tax Act of 1913, which dividend was based upon surplus which had accumulated prior to the passage of that Act. Congress acted promptly to make clear that such an interpretation of income did not agree with Congressional intent. Even prior to the decision in the *Towne* case, and apparently as soon as the question was raised, Congress changed the 1918 Income Tax Act to expressly include stock dividends within the meaning of income. The interpretation of the latter Act by the United States Supreme Court in 1920 brought forth the celebrated decision of *Eisner vs. Macomber*, 252 U. S. 189, 64 L. Ed. 521, holding that a stock dividend was not income within the meaning of the 16th Amendment to the Federal Constitution, and, consequently, the Federal Government was without authority to tax a stock dividend as income. In rendering this decision, the Court divided five to four, Justices Holmes and Brandeis writing dissenting opinions.

This decision "***was promptly and sharply criticized," *Helvering vs. Griffiths*, 318 U. S. 371, 87 L. Ed. 843, of which the following is an example: "From a practical com-

mon-sense point of view there is something strange in the idea that a man may indefinitely grow richer without ever being subject to an income tax." 35 Harvard L. Rev. 363, 376. Nevertheless Congress accepted the decision as denying to it the power to tax any stock dividend and inserted in its revenue Act of November 23, 1921, a proviso specifically exempting all stock dividends from income tax. This exempting proviso continued in all Federal acts until 1936. In that year Congress again amended the law, attempting to tax stock dividends, and the question went back to the Supreme Court. Then the Treasury Department asked the Supreme Court to review and overrule *Eisner vs. Macomber*. The Court refused to do so, with three Justices dissenting and a fourth not participating in the decision of the case. *Helvering vs. Griffiths, supra.* The majority opinion, however, made no attempt to justify the soundness of the earlier decision, but it held that inasmuch for fourteen years the Court, Congress and the Treasury Department had agreed that stock dividends were not taxable as income a reversal would be unjust, concluding: "We have recently held as to another questioned decision of this Court that a long period of accommodations to an older decision sometimes require us to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change. *** We think this another example of the same principle." And they held further that the Congressional act under consideration was not sufficient to raise the question of a review of the decision in *Eisner vs. Macomber*.

In the meantime the Court had held, directly contrary to the general understanding, that *Eisner vs. Macomber* did not hold that Congress was powerless to tax all stock dividends; and that if a stock dividend gave the stockholder an interest different in character from that which he formerly held it was taxable as income. Following this new theory, the Court held that a dividend in common stock to preferred stockholders was income, *Koshland vs. Helvering*,

298 U. S. 441, 80 L. Ed. 1268, and that a dividend in preferred stock to holders of common stock was likewise income, within the meaning of the 16th Amendment. *Helverying vs. Gowan*, 302 U. S. 238, 82 L. Ed. 225.

Later on the Court, in a case in which the facts appear to be identical with the facts of the case at bar, held that a dividend of preferred stock paid to the sole owner of all the common stock of the corporation was not taxable as income. *Strassburg vs. Commissioner*, 318 U. S. 604, 87 L. Ed. 1029. Again the Court divided; three of the Justices dissenting, and a fourth not participating.

Turning now to a review of the State income tax acts and our Supreme Court decisions thereon, we find that,

"In 1922 the General Assembly passed its first income tax law (Income Tax Act of 1921 (32 St. at Large, p. 896)). Up to that time those liable therefor were paying to the federal government an income tax. The Income Tax Law of 1921 of South Carolina provided that the return for income taxes under that Act should be the same as that made to the federal government and the amount of the tax paid to the State should be one-third of the amount paid to the federal government.

"In the year 1927, the General Assembly passed another income tax law (Income Tax Act of 1926 (35 St. at Large, p. 1)), which repealed the Act of 1921, and which required that the taxpayer make his own return, and provided how the tax should be assessed thereon." *Read Phosphate Co. vs. S. C. Tax Commission*, 169 S. C. 327.

It thus appears that this State, in writing its income tax law of 1926, did not adopt the Federal law. And, even though it may have followed the Federal law in some respects, there was one material difference: the State refused to adopt the provision in the then current Federal Act which specifically exempted stock dividends from income tax; and that is the important thing here. In 1927 this exempting proviso had been carried in the Federal acts for six

years. This action of the General Assembly tends to strengthen the State's claim that it was the legislative intent that a stock dividend should be taxed as income. This construction of our State Act is in accordance with the general rule, followed without exception by the State Courts, which have spoken:

Since a stock dividend may be a distribution of profits to a stockholder, constituting income of such shareholder, the taxability of such income depends on the terms of the statute imposing the tax. Thus, except where a statute imposing a tax on incomes otherwise specifically provides, or exempts stock dividends, or exempts stock dividends paid in new stock of the company issuing it, it has been held that a stock dividend in the ordinary sense, being a dividend on corporate stock paid in newly issued stock of the corporation, as distinguished from one paid in treasury stock or in stock of a subsidiary or other corporation, is income, within the meaning of the statute, and so is subject to taxation thereunder, whether it represents earnings or profits of the corporation or an increase in the value of corporate assets, although on the latter point there is also authority to the contrary." 85 C. J. S. 757. Reference to the cases cited in support of the text, and of those cases reviewed by Justice Brandeis in his dissenting opinion in *Eisner vs. Macomber, supra,* show that they come from some of the most highly respected Courts of the land.

In addition, our Court has held that an interpretation given the income tax law by the South Carolina Tax Commission should be given great weight, *U. S. Rubber Products Company vs. S. C. Tax Commission,* 189 S. C. 386, which is in accord with many of our decisions, including *Hadden vs. S. C. Tax Commission,* 183 S. C. 138; *Read Phosphate Company vs. S. C. Tax Commission, supra; Asmer vs. Tax Commission* ___ S. C. ___, 82 S. E. 2nd 465.

More important is that our Supreme Court has decided the principle involved here in the case of *Wilson vs. S. C.*

*Tax Commission*, 220 S. C. 171. Although the facts are not identical, that case squarely decides that a stock dividend is income within the meaning of our income tax Act. In that case the two owners, in equal amount of the shares of the corporation, formed a second corporation. The old corporation conveyed to the new one property of the approximate value of $55,000.00, which constituted the surplus of the old corporation. Shares in the new corporation were issued to the stockholders of the old in equal amounts without consideration. This stock was held to be income and taxable as such.

In that case the stockholders apparently argued the theory upon which the Federal decisions hereinbefore cited are based, particularly *Strassburger vs. Commissioner*, which is to the effect that a stockholder in receiving a stock dividend is no richer than he was before in that he owns the same proportionate interest in the corporation. Our Supreme Court, speaking through Mr. Justice Stukes, answered the argument conclusively: "Appellants ingeniously argue to the fallacious conclusion that they are individually no better off financially than before; but they are, because they now personally own valuable shares of stock in the new corporation which they did not before. They now, in effect, own the former surplus of the old corporation which before was the property of it. Of course, the book (and real) value of appellants' shares in the old corporation has been reduced but that is the inevitable result of every payment of corporate dividends. The transaction under review amounted to a distribution of the accumulated profits or surplus of the old corporation, which is equivalent to the payment of dividends to the stockholders.

"If the old corporation had transferred its real estate, which was its surplus, to appellants, or converted it into cash and paid it to them, they would not contend that it was not taxable income; and the practical result of that has been accomplished by the method followed. They possess,

in the form of shares in the new corporation, the former surplus of the old corporation. Under these circumstances it is reasonable to hold it to be taxable income, as the respondent and the trial court did. It comes within the definition approved in *Southern Weaving Co. vs. Query*, 206 S. C. 307, 34 S. E. (2d) 51, 61, that income, as used in a tax statute is to be taken in its ordinary sense of gain or profit." *Wilson vs. S. C. Tax Commission*, 220 S. C. 171.

This reasoning is equally applicable here, if not more so, for in *Eisner vs. Macomber* it seems to have been conceded that where a dividend is declared and a stockholder has the privilege of taking his dividend either in cash or stock, then even though he elects to take the stock dividend, it is income. In this case the stockholder had that election, for he alone determined the method by which the dividend was paid.

There is one other matter that requires mention. Plaintiffs call attention to Section (7) (E) of Act 164 of 1953, relating to long and short term capital gains, which reads: "In determining the period for which the taxpayer had held stock or rights to acquire stock received upon **a non taxable stock dividend** or split up of the stock, there shall be included the period for which he held the stock in the distributing corporation prior to the receipt of such stock or rights upon such distribution." (Emphasis added.)

This act was expressly repealed by the same General Assembly by Act 296. Even so, plaintiffs contend that the temporary adoption of that act shows that the General Assembly recognized that there existed "a non taxable stock dividend". Unquestionably, a great many, if not all of the Courts, which have held that a stock dividend in a general sense is income and subject to income tax, have recognized exceptions. The quotation from Corpus Juris Secundum shows that. Here we go no further than the facts of this case, and do not say that all stock dividends are taxable as income. By the same token, the quoted language of the

General Assembly cannot be construed as saying that all stock dividends are not taxable as income. As we have seen, the Federal decisions have not gone that far.

For these reasons the demurrer of the defendants is sustained, and,

It is so ordered.

STEVE C. GRIFFITH,
Presiding Judge.

February 5th, 1955.

## OPINION OF THE SUPREME COURT OF SOUTH CAROLINA

J. A. ROPER AND FRANCES G. ROPER, APPELLANTS

*versus*

SOUTH CAROLINA TAX COMMISSION AND OTIS W. LIVINGSTON, CHAIRMAN, JAMES W. CRAIN, JAMES H. SULLIVAN, JAMES A. CALHOUN, JR., AND FRANCIS M. PINCKNEY, CONSTITUTING THE MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION, RESPONDENTS.

No. 17335.

Supreme Court of South Carolina.

July 30, 1957.

MOSS, Justice.

J. A. Roper and Frances G. Roper, husband and wife, the appellants herein, who had filed a joint income tax return for the year 1951, brought this action against the South Carolina Tax Commission, the respondent herein, under and pursuant to Title 65—Sections 2661-2, 1952 Code of Laws of South Carolina, to recover certain income tax

and interest thereon, which appellants had paid under protest.

It appears from the complaint that in 1929 Roper Motor Company was organized as a business corporation under the laws of this State and had an authorized capital stock of $6,000, divided into 60 shares of common stock, all owned by J. A. Roper. In the year 1951, the charter of Roper Motor Company was amended to provide for the issuance of preferred stock of the par value of $124,000, represented by 1,240 shares with a par value of $100 each. The corporation issued this preferred stock to J. A. Roper as a stock dividend, and appropriate entries were made upon the books of the corporation, resulting in the surplus account of the corporation being decreased by $124,000 and the capital stock account increased by the same amount. J. A. Roper did not report this stock dividend as income in his income tax return for the year 1951, and upon an examination of the return by the Tax Commission, an additional assessment was made, resulting in the payment thereof under protest, and this suit was brought to recover the payment so made.

The respondent demurred to the complaint upon the ground that the complaint fails to state a cause of action for the reason that it appears that J. A. Roper received, in 1951, a stock dividend by way of preferred stock, which said dividend constituted income within the meaning of the "Income Tax Act of 1926"—Section 65-201 et seq., 1952 Code of Laws of South Carolina. The lower Court sustained the demurrer interposed by the respondent, thereby holding that the preferred stock dividend declared by Roper Motor Company was income and subject to income tax. From the order sustaining the demurrer, the appellants prosecute this appeal. The case is before this Court upon a number of exceptions. These exceptions pose one question: "Is the dividend of preferred stock by a corporation, whose outstanding stock was all common stock and owned

by one individual, taxable as income to the owner of the common stock?"

(1,2) It is elementary that in passing upon a demurrer, the Court is limited to a consideration of the pleadings under attack, all of the factual allegations whereof that are properly pleaded are for the purpose of such consideration deemed admitted. *Spell vs. Traxler,* 229 S. C. 466, 93 S. E. 2d 601. If a complaint states any cause of action, a demurrer should not be sustained. *Fleming v. Pioneer Life Ins. Co.,* 178 S. C. 226, 182 S. E. 154. It has also been held that when a fact is pleaded, whatever inferences of law or conclusions of fact may properly arise from it, are to be regarded as embraced in such averment. *Bryant v. Smith,* 187 S. C. 453, 198 S. E. 20.

In sustaining the demurrer interposed by the respondent, the lower Court determined that a stock dividend declared out of the accumulated surplus of a corporation, and paid in preferred stock to the sole owner of the common stock, which was the only class of stock outstanding, was income to the recipient stockholder within the meaning of "The Income Tax Act of 1926".

The appellants assert that the issuance of the preferred stock here involved is not taxable under the Federal Income Tax Law, 26 U.S.C.A. 1 et seq. They further assert that the State Income Tax Act was a model of the Federal Act, and the United States Supreme Court having construed the Federal Act to mean that a stock dividend is not "income", and inasmuch as these decisions had been made and were known prior to the adoption of our State Income Tax Act, that the General Assembly of this State intended to adopt the definition of "income" therein contained. For this reason the appellants assert that the respondent should likewise consider the stock dividend here involved to be non-taxable.

In 1918, in the case of *Towne v. Eisner,* 245 U. S. 418, 38 S. Ct. 158, 62 L. Ed. 372, the United States Supreme

Court held that a stock dividend was not income within the meaning of the Revenue Act of 1913, 38 Stat. 114. It was not necessary in this case to pass upon the question of whether a stock dividend was income within the meaning of the Sixteenth Amendment to the Constitution of the United States. Congress had, in the meantime, provided that a stock dividend should be considered income to the amount of its cash value. When this provision of the Act was interpreted by the United States Supreme Court, it was held that a dividend in common stock, paid on common stock, was not income within the meaning of the Sixteenth Amendment, chiefly for the reason that income had not been severed from capital or realized by a distribution. Hence, the Federal Government was without authority to tax a stock dividend as income. *Eisner v. Macomber*, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A.L.R. 1570. Although this decision dealt only with a dividend of common stock to common stockholders, it was accepted as a basis for a broader exemption. Congress provided in the Revenue Act of 1921 that "A stock dividend shall not be subject to tax. * * *" 42 Stat. 227, § 201(d). This provision continued in all the subsequent Revenue Acts up to and including that of the year 1936.

We will not further discuss or trace the history of the provisions in the Revenue Acts in respect to Federal income taxation of stock dividends and the Treasury regulations thereunder. It is set forth fully in the case of *Helvering v. Griffiths*, 318 U.S. 371, 63 S.Ct. 636, 87 L.Ed. 843.

However, we do call attention to the case of *Helvering v. Sprouse*, 318 U.S. 604, 63 S.Ct. 791, 87 L.Ed. 1029, where it was held that a stock dividend of preferred stock by a corporation whose outstanding stock was common stock, all owned by one individual, is not taxable income to the owner of the common stock under the Revenue Act of 1936 (26 U.S.C.A. (I.R.C.1954) § 305).

The appellants invoke the doctrine set forth in *Ful-*

*ghum v. Bleakley,* 177 S.C. 286, 181 S.E. 30, that where the language incorporated into a statute is identical, or substantially identical, with that appearing in similar statutes of other states, which have received judicial construction and interpretation, prior to the adoption of the statute under consideration, in the absence of an expressed intention to the contrary, it will be presumed that the subsequently enacted statute was intended to be understood and applied in accordance with the construction given it by the courts of the states which had first adopted it. The foregoing rule of construction was fully set out in *Fuller v. South Carolina Tax Commission,* 128 S.C. 14, 121 S.E. 478. This brings us to a consideration of the question of whether "The Income Tax Act of 1926", now contained in Section 65-201 et seq., 1952 Code of Laws of South Carolina, contains identical, or substantially identical, language as that appearing in the Federal Income Tax Law.

It is provided in art. 10—Section 1, of the 1895 Constitution of South Carolina: * * * "That the General Assembly may provide for a graduated tax on incomes, * * *."

We do not intend to discuss the history of the income tax law in this State. However, it appears that the first income tax law was enacted on March 5, 1897, and appears in 22 Stats. at 529. This income tax law was codified in Section 325 et seq., of the 1902 Code of Laws of South Carolina. A subsequent codification appeared in Section 354 et seq., of the 1912 Code of Laws of South Carolina.

By Act No. 502, approved March 13, 1922, 32 Stats. 896, the General Assembly of this State adopted "An Act to Raise Revenue for the Support of the State Government by the Levy and Collection of a Tax upon Income".

By the terms of Section 2 of said Act, it was provided:

> "That for the purpose of determining the amount of net income, upon which income taxes are to be paid under the provisions of this Act, and for the purpose of

fixing the amount of the said income tax, the payment and collection thereof, all of the provisions of an Act of Congress of the United States of America, entitled 'An Act to reduce and equalize taxation, to provide revenue and for other purposes,' approved November 23, 1921, relating to levy, assessment and collection of income tax by the United States Government, and Acts amendatory thereto, relating to income tax and the collection thereof, which have been passed and approved prior to the time of the approval of this Act, the assessing and collecting of said tax and surtaxes, and all rules and regulations promulgated by the Department of Internal Revenue under and by virtue of said Acts be, and the same are hereby, adopted and enacted, together with all of the provisions thereof applicable to the enforcement of the same, which are not in conflict with any of the provisions of this Act, and declared to be the method, means and manner by and under which the amount of the net income of any taxpayer shall be ascertained and the amount of income tax due the State of South Carolina computed subject to the exemptions and limitations hereinafter set out in this Act, the same as if the said Act and all Acts amendatory thereto were set forth in full in totidem verbis:"

In the case of *Lancaster Cotton Mills v. South Carolina Tax Commission*, 132 S.C. 466, 129 S.E. 429, 431, this Court, in holding that the General Assembly of this State adopted the Federal Income Tax Law as the law of this State, said:

"The State of South Carolina has adopted the Federal Income Tax Law as will be seen by reference to the Act of the General Assembly approved March 13, 1922, particularly Section 2 of the Act, and as to which it is said in *Santee Mills v. Query*, 122 S.C. 158, 115 S.E. 202:

" 'The provisions of one statute may be made applicable to another by reference to the former in the lat-

ter, in the absence of constitutional restriction.' • • • The federal Income Tax Law, referred to in the State Act is as fully effective in the State of South Carolina for the purposes of the national government as if it had been reenacted totidem verbis by the General Assembly of South Carolina. • • • The State Tax commission has no power delegated to make any rules or regulations inconsistent with the law enacted or for any other purpose than to carry out the legislative will expressed in statutory form."

• • • • •

"Since the Federal statute and the Federal rules and regulations govern, if the contention of the state tax commission should prevail, then this statute and these regulations would be set aside, and regulations made by the State tax commission would be substituted in their stead, and a tax would be collected by the state, when none is found to be due the Federal Government, and the state could only, in any event, collect a sum equal to 33 1-3% of the amount which was paid to the federal government, and, when no tax is exacted, or found to be due by the federal government, none can be collected by the State tax commission.

• • • • •

"The state tax commission will therefore make its books and rules and regulations conform to the Federal Statute and the Federal rules and regulations promulgated in pursuance of the statute."

This Court likewise held in *Santee Mills v. Query*, 122 S.C. 158, 115 S.E. 202, 205, as follows:

"But we do not think the contention that the act adopts or attempts to adopt future laws, rules and regulations of the Federal government is warranted by the language of the statute. The reference (section 2 of the

act) is to the United States Income Tax Act of November 23, 1921, and acts amendatory thereto 'which have been passed and approved prior to the time of the approval of this act.' The 'rules and regulations promulgated by the Department of Internal Revenue under and by virtue of said acts' are also adopted in the state act. While the language used with respect to said 'rules and regulations' is perhaps broad enough to cover future rules and regulations, in the absence of a clear indication of a different intention, it will be presumed that it was the intent of the lawmakers to restrict the application of the statutory provision in question to the legitimate field of legislation (6 R.C.L., p. 80; *School Town of Andrews v. Heiney*, 178 Ind. 1, 98 N.E. 628, 43 L.R.A., N.S., 1023, Ann. Cas. 1915B, 1136; *Commonwealth v. People's Express Co.*, 201 Mass. 564, 88 N.E. 420, 131 Am. St. Rep. 416), and that the rules and regulations thus adopted by reference were those in force at the time of the approval of the act."

When the Income Tax Act of 1922 was adopted by the General Assembly of this State, the cases of *Towne v. Eisner* and *Eisner v. Macomber, supra*, had already been decided by the Supreme Court of the United States. The Federal Revenue Act of 1921 was also in effect at the time the General Assembly of South Carolina adopted the Federal Income Tax Act, and it provided "a stock dividend shall not be subject to tax". If this case had to be decided under the provisions of the Income Tax Act of 1922 and the two Supreme Court decisions above referred to, we would, under the rule set out in *Fuller v. South Carolina Tax Commission, supra*, be compelled to hold that the judicial construction and interpretation of the Federal Income Tax Act, as to dividends, would be binding upon this Court. This would be in line with the holding of this Court in the case of *Pacolet Mfg. Co. v. Query*, 174 S.C. 359, 177 S.E. 653, 655 98 A.L.R. 1440, where this Court was called upon to

determine whether it was proper to include in the capital stock for assessment of license tax the stock issued by way of stock dividend, it appearing that in 1923 the entire capital stock of Pacolet Mfg. Co. amounted to $4,000,000, one-half of which had been paid in cash, or its equivalent, by the stockholders, and the other one-half had been issued to the stockholders out of the surplus or earnings by way of a stock dividend. This Court said:

> "The corporation and its duly constituted authorities, having elected to transfer the surplus fund to capital stock, which made said dividend stock not taxable as income under the federal or the state law, cannot now escape the state license tax by saying that this stock is still surplus."

By Act No. I, approved October 12, 1926, 35 Stats. 1, the General Assembly of this State adopted the "Income Tax Act of 1926". This Act, with amendments, is now incorporated in Title 65—Sections 201-367, inclusive, 1952 Code of Laws of South Carolina. It was provided in the basic Act "that on the passage of this Act, the Income Tax Act approved the 13th day of March, 1922, as amended, is repealed, to take effect January 1st, 1926". § 42.

Upon the enactment by the General Assembly of this State of the "Income Tax Act of 1926", the Income Tax Act of 1922 was fully and completely repealed. What was the effect of the repeal? In *South Carolina Mental Health Comm. v. May*, 226 S.C. 108, 83 S.E. 2d 713, 716, it is stated:

> "The general rule, of course, is that the repeal of a statute has the effect of blotting it out as completely as if it had never existed and of putting an end to all proceedings under it. 59 C.J. 1189, 1190, and cases there cited."

(3) It is apparent by the enactment of the "Income Tax Act of 1926" that the General Assembly decided to have a separate and distinct income tax law. The repeal of the

Income Tax Act of 1922 completely removed from the Income Tax Laws of South Carolina any reference to the Federal Income Tax Act. The General Assembly refused to adopt in the State Income Tax Act the provisions in the then current Federal Act, which specifically exempted stock dividends from income tax. This action of the General Asembly shows a legislative intention that a preferred stock dividend should be taxed as income. If the General Assembly had intended to follow and adopt the Federal Rule, it would have been quite easy and appropriate, if such was the intention of the Legislature, for it to say in the new enactment, when it used the word "dividends", but that such should not include a stock dividend.

In Title 65—Section 251 of the 1952 Code of Laws of South Carolina, gross income is defined as follows:

> "The words 'gross income' mean the income of a taxpayer derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property, and also from interest, rent, dividends, securities or the transaction of any business carried on for gain or profit and income derived from any source whatsoever. The amount of all such items shall be included in the gross income of the income year in which received by the taxpayer unless, under the methods of accounting permitted under this chapter, any such amounts are to be properly accounted for as of a different period."

What is the definition of a "dividend"? In what sense did the General Assembly use this word in the Income Tax Act? This Court in *Gable v. South Carolina Tax Commission*, 189 S.C. 346, 1 S.E. 2d 244, 246, gave a definition of dividends in the following language:

"Dividends have been defined as a 'fund set apart out of profits, to be apportioned among the shareholders.' 18 C.J., 1406. In *Lynch vs. Hornby, supra,* the Court had this to say thereabout: 'Dividends are the appropriate fruit of stock ownership, are commonly reckoned as income, and are expended as such by the stockholder without regard to whether they are declared from the most recent earnings, or from a surplus accumulated from the earnings of the past, or are based upon the increased value of the property of the corporation.'"

This Court has announced the rule that the word "income" as used in a tax statute is to be taken in its ordinary sense of gain or profit. *Southern Weaving Co. v. Query,* 206 S.C. 307, 34 S.E. 2d 51; *Beard v. South Carolina Tax Commission,* 230 S.C. 357, 95 S.E. 2d 628.

In *Etiwan Fertilizer Co. v. South Carolina Tax Commission,* 217 S.C. 354, 60 S.E. 2d 682, 684, the following rule was announced:

"We have likewise held that in the construction of a statute, if its terms are clear and unambiguous, they must be taken and understood in their plain, ordinary and popular sense, unless it fairly appears from the context that the Legislature intended to use such terms in a technical or peculiar sense. *Weston v. Board of Com'rs of Police Insurance and Annuity Fund,* 196 S.C. 491, 13 S.E. 2d 600; *Windham v. Pace,* 192 S.C. 271, 6 S.E. 2d 270. The prime object, of course, in the construction of a statute is to ascertain and give effect to the legislative intent."

(4) It is logical to conclude that the General Assembly of this State having repealed the Income Tax Act of 1922, in its entirety, thereby eliminating as a part of the Income Tax Law, the Federal Act, which had been incorporated therein by reference, was no longer to be bound by the Federal Act nor any decisions of any Court con-

struing such Act. We so hold.

We must construe the word "dividend" in the plain, ordinary and popular sense of gain or profit. There is nothing in the Income Tax Act of 1926 which shows that the General Assembly used the word in a technical or peculair sense. It did not see fit to place any limitation or condition in the Act in connection with the use of the word which requires any other construction.

(5) The dividend received by J. A. Roper was of preferred stock and, while the record does not reflect the preferences, conditions, restrictions and liabilities, if any, fixed in such certificates of preferred stock, it is common knowledge that such has different characteristics from common stock. We can assume that in the issuance of the preferred stock, the provisions of Title 12—Section 211 et seq., were used as the basis for the issuance thereof.

In the case of *Georgia Power Co. v. Watts*, 184 Ga. 135, 190 S.E. 654, 659, 110 A.L.R. 465, we find the following:

> "The term 'preferred stock,' according to general legal interpretation, is stock which entitles the holder to receive dividends from the earnings of a company before any dividends are paid on the common stock. By a 'dividend' is meant money paid out of its profits by a corporation to its stockholders in priority to that to be paid to another class."

In 13 Am. Jur., Corporations, para. 201, at page 319, it is said:

> "The peculiar and distinguishing characteristic of preferred stock is that it is entitled to a priority over other stock in the distribution of profits, being ordinarily entitled to dividends of a definite percentage or amount. Preferred stockholders may, however, by agreement be given a preference over common stockholders in the capital of a corporation, and such pref-

erence will be given effect upon a dissolution of the corporation."

In the Order of the lower Court there is cited the case of *Wilson v. South Carolina Tax Commission*, 220 S.C. 171, 66 S.E. 2d 698, and it is asserted that the case held "although the facts are not identical, that case squarely decides that a stock dividend is income within the meaning of our Income Tax Act." We should point out that the *Wilson* case did not go to the extent of holding that a stock dividend is income within the meaning of the Income Tax Act, because there a new corporation was formed to which a portion of the surplus of an existing corporation was transferred in order to insulate its real estate from liability. As a part of the plan the shares of the new corporation were distributed to the shareholders of the old corporation. It was held that the shareholders received a distribution of the profits of the old corporation and were liable for income taxes thereon.

(6) It should be stated that the holding we have here made as to the taxability of a preferred stock dividend is in accord with that adopted by the Tax Commission. This construction as given by the Tax Commission is entitled to most respectfuly consideration, and ought not to be overruled without cogent reasons. *Asmer v. Livingston*, 225 S.C. 341, 82 S.E. 2d 465.

We conclude that the lower Court was correct in sustaining the demurrer interposed by the respondent to the complaint by appellants.

Affirmed.

STUKES, C. J., and TAYLOR, OXNER and LEGGE, J. J., concur.

## PETITION FOR RE-HEARING

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA:

The Petition of the Plaintiffs-Appellants, J. A. Roper and Frances G. Roper, respectfully shows:

Petitioner requests of the Court under Rule 17 for a rehearing in this case upon which opinion has been heretofore filed by the honorable Court, in that the following points, Appellants most respectfully submit, have been overlooked or misapprehended:

1. The Court, it is respectfully submitted, overlooked passing upon the Federal constitutional question presented to the trial Court (transcript of record page 2, folio 7) and reserved on appeal by exceptions (transcript of record pages 22-23, folio 87-89) and argued on appeal as one of the reasons why Appellants' Complaint states a cause of action (Appellants' Brief, pages 24-26), to-wit, that to find and declare a dividend of preferred stock by a corporation, all of whose outstanding stock was owned by the Appellants, to be income when in fact it is submitted such a stock dividend is not income, violates Paragraph 1, Amendment XIV of the Constitution of the United States in that such constitutes a taking of Appellants' property without due process of law.

2. The Court, it is respectfully submitted, overlooked passing upon the constitutional question presented to the trial Court (transcript of record, page 2, folio 7) and reserved on appeal by exceptions (transcript of record, page 19, folio 74 and pages 22-23, folio 88-89) and argued on appeal as one of the reasons why Appellants' Complaint states a cause of action (Appellants' brief, pages 24-26), to-wit, that to find and declare a dividend of preferred stock by a corporation, all of whose outstanding stock was owned by the Appellants, to be income when in fact it is submitted such a stock dividend is not income, violates Paragraph 5 of Article I of the Constitution of South Carolina of 1895,

in that such constitutes a taking of Appellants' property without due process of law and denies Appellants equal protection of the law.

3. It is respectfully submitted that the Court overlooked the fact that when the South Carolina Income Tax Statute of 1926 was adopted, repealing the Act of 1922, the General Assembly of South Carolina adopted the same definition of gross income as was contained in the applicable Federal Income Tax Statute (which was the same definition as contained in the 1922 Statute) and such Statute had been construed by the Supreme Court of the United States in *Towne v. Eisner*, 245 U.S. 418, 62 L.Ed. 372, 38 S.Ct. Rep. 158 L.R.A. 1918-D 254 and *Eisner v. Macomber*, 252 U.S. 189, 64 L.Ed. 521, 40 S.Ct. Rep. 189, 9 A.L.R. 1570 to the effect that a stock dividend was not gross income within the meaning of the term as used in the Federal Statute. Such definition, it is submitted, was in the mind of the General Assembly at the time it passed the Act of 1926.

4. It is respectfully submitted that the Court overlooked the fact that the General Assembly of South Carolina, in defining gross income (Title 65-251 of the Code of 1952), made no distinction between stock dividends of preferred stock and dividends of common stock.

5. In holding: "If this case had to be decided under the provisions of the Income Tax Act of 1922 and the two Supreme Court decisions above referred to, we would, under the rule set out in *Fuller, et al, vs. South Carolina Tax Commission, supra*, be compelled to hold that the judicial construction and interpretation of the Federal Income Tax Act, as to dividends, would be binding upon this Court," the the Court overlooked the fact that Section 22(a) of the Federal Revenue Act was in force in 1922 and also in 1926 and that the South Carolina General Assembly re-adopted the same definition of gross income in both Statutes as evidenced by the use of the wording: ". . . and also from interest, rent, dividends, securities or the transaction of any

business carried on for gain or profit and income derived from any source . . ."

Respectfully submitted,

ROBERT A. DOBSON, JR.,
JULIEN D. WYATT,
FELIX L. FINLEY, JR.,
JOHN T. GENTRY,
Attorneys for Appellants.

## CERTIFICATE FROM COUNSEL

The undersigned firm of attorneys engaged in general practice of law at Greenville, South Carolina, do hereby certify to the following facts:

At the request of counsel for appellants in the case of *J. A. Roper and Frances G. Roper, appellants, v. South Carolina Tax Commission and Otis W. Livingston, Chairman, James W. Crain, James H. Sullivan, James A. Calhoun, Jr., and Francis M. Pinckney, Constituting the Members of The South Carolina Tax Commission, Respondents,* (case No. 4240, opinion No. 17335, filed July 30, 1957), we have carefully read the transcript, arguments, the opinion of the Court, and the petition for rehearing, and have given some study and thought to the decisions therein cited, with the view of ascertaining whether or not we could give the opinion required by Rule 17.

We have made a conscientious effort fully to comply with the Court's ideas as to what should be done in such a matter, by "counsel not concerned in the case," and now give it as our professional opinion that there is merit in the grounds of the petition for rehearing, and that the same is not intended for any purpose of delay.

LOVE, THORTON & ARNOLD

BY: JAMES L. LOVE.

## ORDER DENYING PETITION FOR RE-HEARING

"After careful consideration of the within Petition for Rehearing, we are satisfied that none of the points therein referred to was overlooked or misapprehended in the Opinion heretofore filed. The Petition is accordingly denied.

August 20, 1957.

T. H. STUKES, C.J.
C. A. TAYLOR, A.J.
G. DEWEY OXNER, A.J.
LIONEL K. LEGGE, A.J.
JOSEPH R. MOSS, A.J."

## CERTIFICATE OF CLERK

I, J. B. Westbrook, Clerk of the Supreme Court of South Carolina, hereby certify that the foregoing Appendix contains true and correct copies of Order of Court of Common Pleas of Pickens County, opinion of the Supreme Court of South Carolina, Petition for Re-Hearing and Order Denying Petition for Re-Hearing in the foregoing case.

J. B. WESTBROOK,
Clerk of the Supreme Court
for South Carolina.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 9 1957
JOHN T. FEY, Clerk

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 608

J. A. ROPER AND FRANCES G. ROPER, PETITIONERS,

*versus*

SOUTH CAROLINA TAX COMMISSION AND OTIS W. LIVINGSTON, CHAIRMAN, JAMES W. CRAIN, JAMES H. SULLIVAN, JAMES A. CALHOUN, JR. AND FRANCIS M. PINCKNEY, CONSTITUTING THE MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION, RESPONDENTS.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. C. CALLISON,
Wade Hampton Office Building,
Columbia, South Carolina,
Attorney General of South Carolina.

JAMES M. WINDHAM,
Columbia, South Carolina,
Assistant Attorney General of South Carolina.
Attorneys for Respondents.

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 608

J. A. ROPER AND FRANCES G. ROPER, PETITIONERS,

*versus*

SOUTH CAROLINA TAX COMMISSION AND OTIS W. LIVINGSTON, CHAIRMAN, JAMES W. CRAIN, JAMES H. SULLIVAN, JAMES A. CALHOUN, JR. AND FRANCIS M. PINCKNEY, CONSTITUTING THE MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION, RESPONDENTS.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents, in opposition to the Petition for the writ of *certiorari* by the Petitioners in this matter, beg to submit the following points and authorities:

### STATEMENT

This is an action for recovery of additional taxes for the income tax year of 1951, in the sum of $7,006.00 assessed against Petitioners by the respondents.

The Petitioner, J. A. Roper, since the incorporation of the Roper Motor Company of Easley in 1929 (hereinafter referred to as the Corporation) has owned all of the outstanding capital stock of this corporation, the same being prior to the fall of 1951, 60 shares of common stock with a par value of $100.00 per each share. In the fall of

1951 the charter of the Corporation was amended to include a resolution adopted and approved earlier, which said resolution provided for the issuance of 1,240 shares of perferred stock, each share having a par value of $100.00 to bear interest at the rate of 4% per annum, payable annually. This resolution further provided that accrued dividends were to be cumulative and to be preferred in the liquidation of the corporation over common stock, both as to par value and accumulated dividends, the holders of preferred stock to have no voting rights except in default in the payment of dividends for more than two years, such stock to be callable at $105.00 per share plus dividends accumulated to September 1, 1953, and thereafter callable at any time at par value plus accumulated dividends.

All of this preferred stock was issued as a stock dividend to Petitioner, J. A. Roper, on September 1, 1951 and at the same time appropriate entries were made in the corporation's books on account of the payment of the dividend, the surplus being decreased by $124,000.00 and the capital stock increased by the same amount. The Petitioners did not report this stock as dividend for the year 1951 and upon examination of the return by respondents the additional assessment was made.

The respondents interposed a demurrer to the complaint and the matter came on to be heard by Honorable Steve C. Griffith, Presiding Judge of the Court of Common Pleas of the Thirteenth Judicial Circuit of South Carolina, on November 22, 1954, who, thereafter filed his Order sustaining the demurrer of respondents.

His Honor, Judge Griffith, in sustaining the demurrer thereby sustained the position argued by respondents, which is to say, that respondents were not bound by the Federal Constitutional limitation of a Federal income tax law on certain types of stock dividends and, absent a specific exemption in the State law covering stock dividends, a

stock dividend, where made under the circumstances alleged in the complaint, is income within the meaning and intendment of the South Carolina Income Tax Act, and thereby rejected the position argued by Petitioners which is to say, that since the South Carolina Income Tax Act was modeled largely after the Federal Income Tax Act and United States Supreme Court had construed the Federal Act to mean generally that a stock dividend is not "income" and since the Court's decisions had been made and were generally known prior to South Carolina's adoption of the Federal law, the Legislature of this State is presumed to have intended the adoption of this Court's definition of income. On the other hand, by sustaining the demurrer of respondents the Presiding Judge thereby concluded that the imposition and collection of the tax by the State of South Carolina was legal and proper under the circumstances set forth and alleged by Petitioners.

The matter was appealed by Petitioners to the Supreme Court of South Carolina which affirmed the opinion of Judge Griffith that the preferred stock dividend issued to the holder of all the common stock was income subject to taxation by the State of South Carolina under its income tax law. Petition for Re-hearing was filed with the South Carolina Supreme Court which was refused by that Court on August 20, 1957.

THE DECISION OF THE SOUTH CAROLINA SUPREME COURT DID NOT DEPRIVE THE PETITIONERS OF DUE PROCESS OF LAW OR EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This matter does not raise any substantial, novel, or undecided federal question of law to meet the requirements of the rules of this Court (Rule No. 19) pertaining to the issuance of Writs of *Certiorari*.

The main contention of the Petitioners is that the decision of the South Carolina Supreme Court in holding the preferred stock dividend issued to the holder of all the common stock to be taxable income under the South Carolina Income Tax Act is a declaration as "income" of that which has been declared not to be income under decisions of this Court and, therefore, is a denial of equal protection of the law and also amounts to depriving Petitioners of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. The real distinction, as we understand it, between the right of the United States to tax such a dividend and the right of a State in connection therewith lies in the question whether, in the federal instance, the stock dividend constitutes income within the Sixteenth Amendment to the United States Constitution.

As a matter of fact, the highest Courts of several of the respective States have held stock dividends to be properly subject to the income tax laws of these States. Among these cases are the following: *Tax Commissioner v. Putnam (Tietra v. Putnam)* (1917), 227 Mass. 522, L. R. A. 1917 F, 806, 116 N. E. 904; *Wilder v. Tax Commissioner*, 234 Mass. 470, 125 N. E. 689; *Tilton v. Tax Commissioner*, 238 Mass. 596, 131 N. E. 219; *Lanning v. Tax Commissioner*, 247 Mass. 496, 142 N. E. 829 and *State ex rel. Dalaney v. Nugaard*, 174 Wis. 597, 183 N. W. 884.

While the highest Courts of the several states, in numbers of instances among which are set forth, *supra*, have held stock dividends to be properly subject to a State income tax, the decisions of this Court, on the other hand, dealing with the matter of the taxability of stock dividends under the Federal statutes, have generally held that stock dividends are nontaxable under the Internal Revenue Statutes and the Sixteenth Amendment to the United States Constitution because of the limitation contained in said

Amendment. Among the decisions of this Court dealing with this matter are *Strassburger v. Commissioner of Internal Revenue*, 63 S. Ct. 791, 318 U. S. 604, 141 A. L. R. 1335; *Eisner v. Macomber*, 252 U. S. 189, 64 L. Ed. 421, 40 S. Ct. 189, 9 A. L. R. 1570; *Helvering v. Griffiths*, 63 S. Ct. 636, 318 U. S. 371, but as we have pointed out, *supra*, in all of these cases, the real question was whether the stock dividend constituted income within the Sixteenth Amendment to the United States Constitution.

This Court, in its landmark case dealing with the taxability of stock dividends under Federal statutes and the Sixteenth Amendment, that is in *Eisner v. Macomber*, *supra*, had therein presented to it by the government in support of the government's contention that the stock dividend therein was subject to a United States income tax, the case among the State decisions, which is the landmark case on this subject, *Tax Commissioner v. Putnam (Trefry v. Putnam)*, *supra*. The government, in the *Eisner case* argued the fact that the State of Massachusetts in the *Putnam case* held a stock dividend to be taxable and that such decision should lend support to its contention for the tax sought to be imposed by the United States. However, this Court in holding that the stock dividend was not taxable under the Federal statute and the Sixteenth Amendment had this to say:

> "The Massachusetts Court was not under any obligation, like the one which binds us, of applying a constitutional amendment in the light of other constitutional provisions that stand in the way of extending it by construction."

Thus it will be readily seen that this Court, in the *Eisner case* itself, recognized a distinction between the right of the government to tax a stock dividend as income, on the one hand, because of the restrictive provisions of the United States Constitution, and the right of the States to

subject a stock dividend to an income tax, on the other hand, which is precisely what we have in the instant matter, that is, the State subjecting the stock dividend to its income tax.

Most important, in support of their contention and, in fact, entirely decisive of the matter that the Petition for a Writ of *Certiorari* should be denied herein the respondents call attention of this Court to the fact that this Court, on October 10, 1938, denied *certiorari* in *Brink v. Commissioner of Corporations and Taxation* (1938), 299 Mass. 280, 13 N. E. (2d) 2 (Writ of *Certiorari* denied in 1938), 305 U. S. 616, 83 L. Ed. 399, 59 S. Ct. 75. In the *Brink case* the Massachusetts Supreme Court, in holding a stock dividend to be subject to the Massachusetts income tax, had this to say:

> "Under the constitution and the laws of this Commonwealth, stock dividends may be taxed as income. Such a scheme of taxation violates no constitutional right of the taxpayer. *Tax Commissioner v. Putnam*, 227 Mass. 522, 534, 116 N. E. 904, L. R. A. 1917 F, 806; *Wilder v. Tax Commissioner*, 234 Mass. 470, 125 N. E. 689; *Tilton v. Tax Commissioner*, 238 Mass. 596, 598, 131 N. E. 219; *Lapham v. Tax Commissioner*, 244 Mass. 40, 138 N. E. 708; *Lanning v. Tax Commissioner*, 247 Mass. 496, 142 N. E. 829. The rule is different under decisions of the Supreme Court of the United States. The Constitution of the United States, in this respect, does not impose a limitation upon the taxing power of this Commonwealth. This taxing power is reserved to the several States as an attribute of sovereign power, and no federal question is involved. In this particular, decisions of this Court are final as to the construction of the statutes of this Commonwealth. *Eisner v. Macomber*, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570; *Dane v. Jackson*, 256 U. S. 589, 41 S. Ct. 566, 65 L. Ed. 1107; *Stebbens v. Riley*, 268 U. S. 137, 45 S. Ct. 424, 69 L. Ed. 884, 44 A. L. R. 1454; *Posados v. Warner; Barnes and Company*, 279 U. S. 340, 346, 49 S. Ct. 333, 73 L. Ed. 729. Therefore, the

decision of *Eisner v. Macomber*, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570 is not binding upon this Court but the decisions of *Tax Commissioner v. Putnam*, 227 Mass. 522, 523, 116 N. E. 904, L. R. A. 1917 F, 806 and *Lanning v. Tax Commissioner*, 247 Mass. 496, 142 N. E. 829, must be accepted as final."

A review of the foregoing will reveal that highlighted in the *Brink* decision, *supra*, among other things, are these specific pronouncements by the Massachusetts Supreme Court, that is to say (1) that the State of Massachusetts was not bound by the case of *Eisner v. Macomber*, a decision of this Court holding stock dividends not to be subject to the imposition of a United States income tax for the reasons therein clearly stated and (2) that no constitutional right of the taxpayer was violated under the Massachusetts scheme of taxation and under its constitution and laws permitting the taxation of stock dividends as income.

*Certiorari* should be denied in the instant matter just exactly like it was denied in the *Brink case, supra*, for the reason that the same holding was made by the Massachusetts Supreme Court as was made by the South Carolina Supreme Court, that is, that under the State law a stock dividend was subject to the State income tax and further that no constitutional right of the taxpayer was denied him in so holding; that the several decisions of this Court (wherein stock dividends were declared not to be income and not subject to a United States income tax) were not binding on the State, the several States not being restricted by the provisions of the Sixteenth Amendment to the United States Constitution as is the federal government. *Certiorari* was denied by this Court in the *Brink case, supra*, and in so doing this Court thereby disposed of similar questions to those presented in the Petition for Writ of *Certiorari* in the instant matter adverse to the contention of the Petitioners.

## CONCLUSION

For the above reasons we do not see any novel, important, or substantial, undecided federal question that meets the requirements of Rule 19 of the Court governing the issuance of Writs of *Certiorari*.

It is settled that the several States are not bound by the constitutional limitation of the Sixteenth Amendment in imposing their income taxes.

Petitioners have had a full and complete opportunity to present their case in both the Court of Common Pleas of South Carolina and also in the Supreme Court of the State of South Carolina which courts considered all aspects of the matter and rendered decisions which in no way deprive Petitioners of their property without due process of law and which in no way deny to Petitioners the equal protection of the law.

We respectfully ask the Court to deny the writ.

T. C. CALLISON,
Attorney General of South Carolina.

JAMES M. WINDHAM,
Assistant Attorney General of South Carolina.

Attorneys for Respondents.